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95-1583

Supreme Court, U.S.
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CLERK

No. _____

In The

Supreme Court of the United States

October Term, 1995

JUDITH GREEN
and
PAUL BAIR
and all others similarly
situated,

Petitioners,

v.

PENNSYLVANIA MUNICIPAL SERVICE
COMPANY, BOROUGH OF
WILKINSBURG, BOROUGH OF RANKIN,
and all other municipalities
similarly situated,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF PENNSYLVANIA

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February 6, 1996

70 pp

QUESTIONS PRESENTED FOR REVIEW

1. Whether, for the purposes of 42 U.S.C. §1983, a municipal corporation has deprived its citizens of property without due process of law when it hires a private corporation to collect delinquent sewage charges, and lets that same corporation set and impose penalties in such a manner that the municipalities' citizens cannot obtain judicial hearings respecting the penalties imposed?

2. Whether a private, for-profit corporation engaged by a municipal corporation to collect delinquent sewer charges is exempt from the Federal Fair Debt Collection Practices Act, 15 U.S.C. §1692 *et seq.* because the corporation *acted* as a municipal officer in collecting the delinquent sewer charges?

PARTIES TO THE PROCEEDINGS

The caption of the case in this Court contains the names of all parties to the proceedings in the Pennsylvania Supreme Court, the classes having not yet been certified.

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PETITION FOR WRIT OF CERTIORARI

Paul Bair, Judith Green, and all others similarly situated, the petitioners herein, respectfully pray that a writ of certiorari issue to review the judgment of the Pennsylvania

Supreme Court entered on November 8, 1995 in the above-entitled case.

OPINIONS BELOW

The Pennsylvania Supreme Court's order denying the petition for allowance of appeal is not reported and is reproduced in full in Pet. App. 1a. The Opinion of the Commonwealth Court of Pennsylvania is not reported and is reproduced in full in Pet. App. 2a to App. 17a.

STATEMENT OF JURISDICTION

The denial of petition for allowance of appeal was entered on 8 November 1995. No rehearing was sought. This petition was filed within (90) days of that denial. The jurisdiction of this Court rests on 28 U.S.C. §1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS

U.S. Const., Amend. XIV, Sec. 1

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall

abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

42 U.S.C. §1983 Civil Action for Deprivation of Rights

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

15 U.S.C. §1692a Definitions

As used in this subchapter -

. . .

(6) The term "debt collector" means any person who uses any instrumentality of interstate commerce or the mails in any business the principal purpose of which is the collection of any debts, or who regularly collects or attempts to collect, directly or indirectly, debts owed or due or asserted to be owed or due another. Notwithstanding the exclusion provided by clause (F) of the last sentence of this paragraph, the term includes any creditor who, in the process of collecting his own debts, uses any name other than his own which would indicate that a third person is collecting or attempting to collect such debts. For the purpose of section 1692a(6) of this title, such term also includes any person who uses any instrumentality of interstate commerce or the mails in any business the principal purpose of which is the enforcement of security interests. The term does not include -

(A) any officer or employee of a creditor while, in the name of the creditor, collecting debts for such creditor;

. . .

(C) any officer or employee of the United States or any State to the extent that collecting or attempting to collect any debt is in the performance of his official duties;

. . .

(8) The term "State" means any State, territory, or possession of the United States, the District of Columbia, the Commonwealth of Puerto Rico, or any political subdivision of any of the foregoing.

53 P.S. §7184. Notice to issue scire facias; failure to issue; claimant not permitted to discontinue after issuance

Any party named as defendant in the claim filed, or admitted to defend thereagainst, may file, as of course, and serve a notice upon the claimant or upon the counsel of record to issue a scire facias thereon, within fifteen days after notice so to do. If no scire facias be issued within fifteen days after the affidavit of service of notice is filed of record, the claim shall be stricken off by the court, upon motion. If a scire facias be issued in accordance with such notice, the claimant shall not be permitted to discontinue the same, or suffer a nonsuit upon the trial thereof, but a compulsory nonsuit shall be entered by the court if the claimant does not appear, or withdraws, or for reason fails to maintain his claim.

53 P.S. §46010 Appeals from ordinances

Complaint as to the legality of any ordinance or resolution may be made to the court. In cases of ordinances laying out streets over private lands, the court shall have jurisdiction to review the propriety as well as the legality of the ordinance.

STATEMENT OF THE CASE

Petitioners Bair and Green own real property in the Boroughs of Rankin, Pennsylvania, and Wilkinsburg, Pennsylvania, respectively. Wilkinsburg and Rankin ("Boroughs") are Boroughs incorporated under the Pennsylvania Municipal Code. Pennsylvania Municipal Company ("PAMS") is a private, for-profit corporation.

Wilkinsburg and Rankin delegated to PAMS the authority to collect delinquent sewage charges and to set penalties for non-payment of these delinquencies. Under the authority granted by the Boroughs, PAMS adopted its own schedule of penalties as to the frequency and amount. PAMS set such penalties arbitrarily and permitted no procedural due process to the property owner by which to contest the legality of the penalty.

To aid in its collection of the delinquent sewage charges and penalties, PAMS repeatedly sends delinquency notices to the property owners. These notices show that PAMS adds a flat-rate penalty of $5.00, $15.00, or $20.00 each time PAMS sends another notice. As a result of repeated receipt of these notices, Green paid PAMS $119.32, of which $55.00 was penalty assessed by PAMS and Bair paid $104.42, of which $85.00 was penalty.

On behalf of themselves and all others similarly situated, Bair and Green sued PAMS, the Boroughs of Wilkinsburg and Rankin and all other municipalities similarly

situated. Bair and Green seek to recover from the Boroughs and PAMS the penalties they paid, as well as relief under the Federal Fair Debt Collection Practices Act ("FDCPA"). One count of the complaint is under 42 U.S.C. §1983 against all municipalities using the services of PAMS to collect delinquent sewer charges.

At the trial court level, PAMS and the Boroughs filed preliminary objections in the nature of a demurrer with respect to all five counts of Bair and Green's Amended Complaint. The Court of Common Pleas of Allegheny County sustained all preliminary objections. Bair and Green appealed and the Commonwealth Court of Pennsylvania sustained the lower court's rulings with respect to three of the counts, including the count filed against the defendant class of municipalities under 42 U.S.C. §1983. The Pennsylvania Supreme Court without opinion denied Bair and Green's Petition For Allowance of Appeal.

Bair and Green's Petition for Writ of Certiorari is limited to two issues. First, whether the Commonwealth Court erred in ruling that Bair and Green did not state a cause of action against the Boroughs under 42 U.S.C. §1983 because they had failed to allege the Boroughs had deprived them of any constitutionally-protected property. The Commonwealth Court held " . . . Bair and Green never claimed that the Boroughs deprived them of any money." Pet. App. 15a. Second, whether the Commonwealth Court erred in ruling that PAMS was exempt from the definition of "Debt Collector" under the FDCPA because PAMS was allegedly "acting" as an officer of the Boroughs when collecting the delinquent sewer charges and penalties. Specifically, the Commonwealth

Court ruled: "In doing so [collecting the delinquent sewer charges and penalties], PAMS acted as a municipal 'officer or employee' within the meaning of the FDCPA while collecting the debts, an activity in the performance of its official duty." Pet. App. 10a.

In the Court of Common Pleas the federal questions sought to be reviewed were raised in counts II and V of Bair and Green's amended complaint. The issues were preserved in Bair and Green's Petition for Allowance of Appeal to the Pennsylvania Supreme Court.

REASONS FOR GRANTING WRIT

I. THE PENNSYLVANIA SUPREME COURT HAS DECIDED THAT PENALTIES IMPOSED WITHOUT AN ORDINANCE OR OTHER PUBLIC ACTION DO NOT VIOLATE PROCEDURAL DUE PROCESS, WHICH DECISION IS CONTRARY TO A DECISION OF THIS COURT.

Regarding Bair and Green's claim under 42 U.S.C. §1983, the Commonwealth Court correctly set forth the proper standard for determining whether Bair and Green have a cause of action thereunder. Bair and Green must establish that the conduct complained of was committed by a person acting under color of state law and that such conduct deprived the plaintiff of rights, privileges or immunities secured by the United States Constitution or laws of the United States.

The Commonwealth Court assigned two reasons for upholding the trial court's dismissal of the Bair and Green's 42 U.S.C. §1983 action. It held that " . . . Bair and Green never claimed that the Boroughs deprived them of any money" (Pet. App. 15a) and that " . . . Green and Bair's complaint failed to identify any specific property of which they have been deprived." Pet. App. 15a. Bair and Green contend that the Commonwealth Court erred on both points and has decided an important federal question in a way that conflicts with a relevant decision of this Court.

The Commonwealth Court held that Bair and Green had not alleged deprivation of any specific property. In paragraphs 26 and 27 (Pet. App. 40a) and Paragraph 51 (Pet. App. 46a) of their Amended Complaint, Bair and Green specifically averred that Green paid $55.00 in penalties and Bair paid $85.00 in penalties. There is no property more specific than a citizen's money.

The other reason assigned by the Commonwealth Court in affirming the dismissal of Bair and Green's 42 U.S.C. §1983 claim is that the Boroughs themselves never deprived Bair and Green of any money. The Boroughs never enacted any ordinances or resolutions setting the penalties, the legality of which could be challenged in court by citizens like Bair and Green. Instead, the Boroughs delegated this legislative function to PAMS, a private corporation, whose actions in setting or imposing the penalties were not open to any challenge in the courts. If the Borough sets the penalty by ordinance the plaintiffs have access for review through the courts, but in this situation Bair and Green have no access to judicial review. This is precisely Bair and Green's

complaint — that they were denied their due process rights under the Fourteenth Amendment.

Procedural due process in the context of a claim under the Pennsylvania Municipal Claims Act was discussed in detail in *Sager v. Burgess*, 350 F. Supp. 1310 (E.D.Pa. 1972) *summarily aff'd*, 411 U.S. 941, 94 S.Ct. 1923, 36 L.Ed.2d 406 (1973), where this Court summarily affirmed the opinion of a three Judge court with respect to a 42 U.S.C. §1983 federal class action suit involving the Pennsylvania Municipal Claims Act.

In *Sager*, Pottstown Borough enacted an ordinance authorizing the paving of certain streets and assessing the abutting properties with a proportionate share of the cost of the paving. When the Sagers failed to pay the assessment, Pottstown caused a lien to be filed against their property in the amount of the assessment. The Sagers filed suit contending that they were denied due process of law because the Act did not provide for a hearing prior to imposition of the lien. The Court held that a lien arising under the Pennsylvania Municipal Claims Act is not constitutionally defective because "access to the Courts is afforded a property owner who desires to challenge the legality of an ordinance [53 P.S. §46010] or to present a defense to the propriety of a lien [53 P.S. §7184]." 350 F. Supp at 1313.

The procedural safeguards described in *Sager* are not present in the case at bar. First, since no ordinance or other public act set the amount and/or frequency of the penalties, Bair and Green had no access to the courts under 53 P.S. §46010 to challenge the legality of the penalties prior to their

imposition. Second, 53 P.S. §7184, the section cited in *Sager* under which propriety of a lien can be challenged, requires that the claim be filed of record before a challenge to its propriety can be made: "Any party named as defendant in the claim filed...." 53 P.S. §7184. If a claim is not filed of record there is no access to the courts under that section. Here, the Boroughs and PAMS have defended the propriety of the penalties exclusively on the ground that liens were not filed of record. The absence of an ordinance or other public act of the Boroughs and the lack of a lien filed of record completely blocked Bair and Green's access to the courts for the purpose of challenging the legality of the penalties. That being the case, the Commonwealth Court's ruling strips Bair and Green of the constitutional safeguards set forth in *Sager*.

The Boroughs imbued PAMS with essential municipal attributes. They contended that PAMS was acting as a municipal officer, and the Commonwealth Court expressly accepted this view of PAMS's role: "...PAMS acted as a municipal 'officer or employee' within the meaning of FDCPA while collecting the debts...." Pet. App. 10a. It was even claimed below that PAMS was entitled to sovereign immunity. Pet. App. 12a in footnote 7. The Boroughs and PAMS claimed that PAMS had the power to set and impose penalties because it was an administrative function, yet the Commonwealth Court held that this power was not an administrative function but a non-delegable legislative function:

> Section 1202 of the Borough Code, 53 P.S. §46202, makes it clear that boroughs have the responsibility of determining the amount of

> interest and costs to be charged on the delinquent sewage rates as well as the obligation to set such rates and costs either through ordinances, regulations, restrictions or prohibitions.

Pet. App. 11a. The Boroughs, being corporations, can only act through their officers or employees and they did so by authorizing PAMS to charge penalties; therefore, the Boroughs themselves did take Bair and Green's money.

The crux of the issue is this: if it is a violation of a citizen's procedural due process rights for municipalities to set and impose penalties without an ordinance, it is certainly a violation of Bair and Green's procedural due process rights by the Boroughs to delegate this very same power to PAMS.

II. THE PENNSYLVANIA SUPREME COURT HAS DECIDED AN IMPORTANT QUESTION OF LAW REGARDING THE FAIR DEBT COLLECTION PRACTICES ACT WHICH HAS NOT BEEN SETTLED BY THIS COURT.

In paragraph 23 of their Amended Class Action Complaint, Bair and Green alleged: (1) PAMS was not a municipal officer; (2) PAMS was an independent contractor; and, (3) PAMS was retained by the Boroughs to collect delinquent sewage charges and penalties. Pet. App. 39a. The Boroughs and PAMS filed preliminary objections claiming that PAMS was acting as a municipal officer when collecting the debts and was, therefore, exempt from the definition of "debt collector" pursuant to 15 U.S.C. §1692a(6)(C). Section

1692a(6)(C) excludes from the definition of "debt collector" officers or employees of a State (or political subdivision under 15 U.S.C. §1692a(8)) in the performance of his official duties. In its opinion, the Commonwealth Court ruled

> . . . [T]he Boroughs. . . appointed PAMS to perform the administrative function of collecting delinquent sewer charges. In doing so, PAMS *acted* as a municipal "officer or employee" within the meaning of the FDCPA while collecting the debts, an activity in the performance of its official duty. [emphasis added]

Pet. App. 10a. In essence, the Commonwealth Court is declaring that by virtue of its collection activities PAMS was acting as a municipal officer or employee, and that by acting as a municipal officer or employee, PAMS was *in fact* a municipal officer or employee excluded from the definition of "debt collector" under the FDCPA. Considering that 15 U.S.C. §1692a(6)(A) excludes officers and employees of private creditors from the definition of "debt collector," the Commonwealth Court's interpretation, by logical extension, would exempt literally everyone who attempted to collect a debt for a creditor because, in collecting the debt, the collector would be acting as an officer or employee of the creditor. Certainly, Congress could not have intended the FDCPA to be interpreted in such a fashion.

CONCLUSION

For all the foregoing reasons, Petitioners respectfully request that this Court grant the instant Petition for a Writ of Certiorari and that this matter be heard by the full Court.

Respectfully submitted,

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APPENDIX A

IN THE SUPREME COURT OF PENNSYLVANIA
WESTERN DISTRICT

JUDITH GREEN AND PAUL BAIR, and all others similarly situated,	No. 361 Western District Allocatur Docket 1995
Petitioners	
v.	
PENNSYLVANIA MUNICIPAL SERVICES COMPANY, BOROUGH WILKINSBURG, BOROUGH OF RANKIN, and all others similarly situated,	Petition for Allowance of Appeal from Commonwealth Court
Respondents	

ORDER

PER CURIAM:

AND NOW, this 8th day of November, 1995, the Petition for Allowance of Appeal is denied

Mr. Justice Montemuro participates by designation as a senior judge as provided by Rule of Judicial Administration 701(f).

A True Copy Irma T. Gardner
as of: November 9, 1995
Test: /s/ Irma T. Gardner
Deputy Prothonotary
Supreme Court of Pennsylvania

APPENDIX B

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

No. 350 C.D.1994
Argued: March 17,1995

JUDITH GREEN and PAUL BAIR,
and all others similarly situated,
Appellants

v.

PENNSYLVANIA MUNICIPAL SERVICES COMPANY, CENTRAL TAX BUREAU OF PENNSYLVANIA, INC., JORDAN TAX SERVICE, INC., BOROUGH OF WILKINSBURG, BOROUGH OF RANKIN,
and all other Municipalities
similarly situated

BEFORE:
HONORABLE BERNARD L. McGINLEY, Judge
HONORABLE ROCHELLE S. FRIEDMAN, Judge
HONORABLE SAMUEL L. ROGERS, Senior Judge

OPINION NOT REPORTED

MEMORANDUM OPINION BY JUDGE FRIEDMAN
FILED: June 1,1995

Judith Green and Paul Bair, and all others similarly situated (collectively, Green and Bair), appeal from an order of the Common Pleas Court of Allegheny County (trial court) sustaining the preliminary objections of the Pennsylvania Municipal Service Company (PAMS), the Boroughs of Wilkinsburg and Rankin and all other municipalities similarly situated[1] (collectively, the Boroughs) and effectively dismissing Green and Bair's class action complaint against PAMS and the Boroughs. We affirm in part and reverse in part.

When Green and Bair failed to pay their sewage bills, their respective municipalities, Wilkinsburg and Rankin, hired PAMS to collect these unpaid municipal claims. Subsequently, PAMS notified Green and Bair of their unpaid debts; however, in addition to the unpaid sewage fees, PAMS also assessed interest and added its own collection costs to these debts. PAMS assessed Green interest and costs of $55 on her $64.32 delinquent sewage bill and assessed Bair interest and costs of $85 on his $104.42 delinquent sewage bill. Green and Bair paid these amounts and then filed a five count class action law suit; counts one through four were brought against PAMS and count five was brought against the Boroughs.

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[1] Those municipalities include all other municipalities contracting with PAMS for collection services. Although the caption to this case includes Central Tax Bureau of Pennsylvania, Inc. and Jordan Tax Service, Inc., those entities were dismissed from the original class action complaint and not included in Green and Bair's amended class action complaint.

PAMS and the Boroughs filed preliminary objections in the nature of a demurrer to all five counts in the class action complaint. The trial court sustained the preliminary objections and dismissed the class action. Green and Bair now appeal to this court,[2] arguing that the trial court erred in sustaining the preliminary objections and dismissing their complaint. We will deal with each count of the complaint separately.

COUNT I

In count I of the complaint, Green and Bair allege that PAMS has collected[3] illegal interest and costs on delinquent

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[2] Our scope of review of a trial court's grant of preliminary objections is limited to determining whether that court committed an error of law or abused its discretion. Peerless Publications Inc. v. County of Montgomery, ___ Pa. Commonwealth Ct.__, ___ A.2d __ (No. 996 C.D. 1994, filed March 10, 1995). In order for a court to sustain preliminary objections, it must appear with certainty that the law will not permit recovery and, where any doubt exists as to whether the preliminary objections should be sustained, that doubt should be resolved by a refusal to sustain them. Id. Preliminary objections admit as true all facts which are well pleaded as well as all inferences which are reasonably deducible therefrom. Id. Factual inquiries are improper on preliminary objections. Id.

[3] In separate counts within their complaint, Green and Bair take issue both with PAMS' collection of interest and costs and with PAMS' independent assessment of those amounts. In count I, we are dealing with only the collection

sewage accounts in excess of the 10 percent prescribed by section 9 of the Act of May 16, 1923 (Municipalities Claim Act), P.L. 207, as amended, 53 P.S. §7143.[4] PAMS objected to this claim, alleging that section 9 of the Municipalities Claims Act governs only the issue of rate of interest that may be charged and liened against real estate after a lien is filed. Because no liens for unpaid sewage charges were ever filed here, section 9 of the Municipalities Claims Act does not take effect. The trial court agreed, holding that despite the Municipalities Claims Act, section 1202(2) of the Borough

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of alleged illegal interest and collection costs in excess of a 10 percent cap imposed under the Municipalities Claims Act. The issue of PAMS' independent assessment of the rate of interest and collection costs is addressed in count III of the complaint.

[4] Section 9 of the Municipalities Claims Act, 53 P.S. §7143, provides in pertinent part:

> Interest as determined by the municipality at a rate not to exceed ten per cent per annum shall be collectible on all municipal claims from the date of the completion of the work after it is filed as a lien, and on claims for taxes, water rents or rates, lighting rates or sewer rates from the date of the filing of the lien therefor....

See also Township of Springfield v. Thomas, 165 Pa. Commonwealth Ct. 331, 645 A.2d 359 (1994), appeal dismissed, ___ Pa. ___, ___ A.2d ___ (No. 109 E.D. Appeal Dkt. 1994, filed May 19, 1995).

Code, Act of February 1, 1966, P.L. (1965) 1656, No. 581, as amended, 53 P.S. §46202(2),[5] authorizes the Boroughs to impose interest and costs in excess of 10 percent if a lien has not been filed by the Boroughs. That is, the Municipalities Claims Act governs only when a lien has been filed; however, if a lien has not been filed, the Borough Code applies, which does not place a 10 percent limit on interest but allows for

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[5] Section 1202(2) of the Borough Code, 53 P.S. §46202(2), provides:

> The powers of the borough shall be vested in the corporate authorities. Among the specific powers of the borough shall be the following, and in the exercise of any of such powers involving the enactment of any ordinance or the making of any regulation, restriction or prohibition, the borough may provide for the enforcement thereof and may prescribe penalties for the violation thereof or for the failure to conform thereto:
>
> ....
>
> (2) Regulation of charges in the operation of its utilities, parking meters, parking lots, recreational facilities or its other facilities and services to the public. In the operation of its utilities, parking meters, parking lots, recreational facilities, and other facilities and services to make and regulate charges therefor for general borough purposes.

reasonable interest and costs as adopted by the respective municipality.

Green and Bair now argue that if the trial court's holding that a municipality may collect interest and costs greater than the 10 percent prescribed in the Municipalities Claims Act before filing a lien, then the setting of interest rates by the General Assembly is rendered meaningless. Furthermore, Green and Bair point out that under the trial court's interpretation, it would be more advantageous for municipalities to refrain from filing liens under the Municipalities Claims Act so that they could fall on the more liberal Borough Code instead.

Moreover, Green and Bair assert that sewage rates are not specifically included in the term "utilities" under the Borough Code and, as such, a conflict exists between the specific provisions of the Municipalities Claims Act, which uses the term "sewer rates," and the general provisions of the Borough Code. Thus, Green and Bair believe that the subject of sewage rates is specifically and unequivocally addressed by the General Assembly in section 9 of the Municipalities Claims Act and, therefore, that act should prevail. See Section 1933 of the Statutory Construction Act of 1972, 1 Pa. C.S. §1933; Department of Transportation Bureau of Driver Licensing v. Campbell, 138 Pa. Commonwealth Ct. 337, 588 A.2d 75 (1991). Indeed, Green and Bair assert that because the authority to charge a penalty under the Borough Code must be inferred from a general term and is not expressly granted, that authority must be denied to the municipality. Cf. Kline v. Harrisburg, 362 Pa. 438, 68 A.2d 182 (1949). We disagree with Green and Bair.

The Municipalities Claims Act governs the filing of municipal claims and provides for procedures to collect unpaid fees. Section 41 of the Municipalities Claims Act, 53 P.S. §7112, states:

> Nothing contained in this act shall be construed to repeal or affect the validity of any other acts of Assembly providing other methods or remedies for the collection of taxes and municipal claims. Municipalities and use-claimants shall have and retain the right to proceed to collect such claims by assumpsit, distraint, or under the acts relating to the collection of taxes upon seated and unseated land, or in any other way or by any other method authorized by law, as though this act had not been passed.

Thus, although section 9 of the Municipalities Claims Act, 53 P.S. §7143, provides for one method of recovering unpaid debts, i.e., through an in rem lien against the property, a municipality's collection procedure is not limited to that form of recovery. Here, we have municipalities initially attempting to recover the debt by instituting an in personam collection procedure against the owners of the property. If the Boroughs subsequently file liens against Green and Bair's properties, then section 9 of the Municipalities Claims Act takes effect and governs the rate of interest and collection costs that may be charged against the liened real estate. That did not happen here.

Accordingly, in this case, PAMS is not prohibited from collecting interest and costs in excess of 10 percent. Therefore, the trial court properly sustained PAMS preliminary objection to count I.

COUNT II

In count II of the complaint, Green and Bair allege that PAMS's debt collection practices violated the Fair Debt Collection Practices Act (FDCPA), 15 U.S.C. §§1692-1692l in that PAMS used unfair means to collect the claims. PAMS objected, claiming that because it acted as an agent for the Boroughs, it was not a "debt collector" for purposes of liability under the FDCPA. Again, the trial court agreed.

The FDCPA imposes liability on a "debt collector" who violates the act. Holmes v. Telecredit Service Corp., 736 F.Supp. 1289 (D. Del. 1990). A "debt collector" is defined as

> any person who uses any instrumentality of interstate commerce or the mails in any business the principal purpose of which is the collection of any debts, or who regularly collects or attempts to collect, directly or indirectly, debts owed or due or asserted to be owed or due another....

15 U.S.C. §1692a(6). 15 U.S.C. §1692a(6) (C) excludes from the definition the following: "any officer or employee of the United States or any State to the extent that collecting or attempting to collect any debt is in the performance of his official duties...." The term "State" is defined to include "any

State...or any political subdivision of any [State]." 15 U.S.C. §1692a(8). Thus, any officer or employee of the Boroughs collecting or attempting to collect a debt is not a "debt collector" to the extent such efforts are "in the performance of his official duty."

Section 1005(l) of the Borough Code, 53 P.S. §46005(1) (emphasis added), authorizes a borough council to appoint collection officers as it deems necessary:

> To create, by motion, ordinance or resolution, and appoint a treasurer, a secretary, a solicitor, an engineer, a street commissioner and such other officers as it deems necessary.

Typically, municipalities contract with outside individuals and firms to act as solicitors, treasurers, auditors, refuse collectors and engineers. In that tradition, the Boroughs here appointed PAMS to perform the administrative function of collecting delinquent sewer charges. In doing so, PAMS acted as a municipal "officer or employee" within the meaning of FDCPA while collecting the debts, an activity in the performance of its official duty. See Heredia v. Green, 667 F.2d 392 (3d Cir. 1981); see also Games v. Cavazos, 737 F.Supp. 1368 (D. Del. 1990).

Thus, the trial court correctly concluded that PAMS was not a debt collector within the meaning of the FDCPA and properly sustained the preliminary objections to count II of the complaint.

COUNT III

In count III of their complaint, Green and Bair allege that PAMS was without authority to determine what interest rate and collection costs to assess on delinquent sewage charges. Green and Bair assert that only municipalities can determine such amounts. PAMS challenged that contention on the basis that the Boroughs are empowered with the authority to appoint "officers," such as PAMS, to make these determinations. The trial court agreed with PAMS, holding that a municipality cannot delegate its legislative power, but may delegate its administrative functions. Believing that the assessment of interest and collection costs is an administrative function, the trial court found no error in PAMS assessment here and dismissed count III. Green and Bair, however, now argue that because the setting of interest and collection costs is a nondelegable legislative function, PAMS had no authority to make an independent assessment of these amounts. We agree with Green and Bair.

The establishment of interest rates and amounts necessary to defray the costs of enforcement and collection is certainly a legislative function. Section 1202 of the Borough Code, 53 P.S §46202, makes it clear that boroughs have the responsibility of determining the amount of interest and costs to be charged on delinquent sewage rates as well as the obligation to set such rates and costs either through

ordinances, regulations, restrictions or prohibitions.[6] Evans v. West Norriton Township Municipal Authority, 370 Pa. 150, 87 A.2d 474 (1952); Skupien v. Gallitzin, 134 Pa. Commonwealth Ct. 115, 578 A.2d 577 (1990). This legislative function is non-delegable. See Evans; see also Moore v. Reed, 126 Pa. Commonwealth Ct. 283, 559 A.2d 602 (1989), appeal denied, 527 Pa. 657, 593 A.2d 428 (1991).[7]

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[6] Section 1202 of the Borough Code, 53 P.S. §46202, provides in relevant part:

> Among the specific powers of the borough shall be the following, and in the exercise of any such powers involving the enactment of any ordinance or the making of any regulation, restriction or prohibition, the borough may provide for the enforcement thereof....

[7] PAMS also alleges that it is immune from liability under the doctrine of governmental immunity because it acted as an agent of the Boroughs. However, 42 Pa.C.S. §8545 (emphasis added) states that:

> An employee of a local agency is liable for civil damages on account of any injury to a person or property caused by acts of the employee which are within the scope of his office or duties only to the same extent as his employing local agency and subject to the limitations imposed by this subchapter.

Accordingly, because Green and Bair set forth a valid cause of action against PAMS in count III, the trial court erred in sustaining the preliminary objections to count III.

COUNT IV

In count IV of the complaint, Green and Bair allege that PAMS made fraudulent misrepresentations to property owners by claiming that PAMS had the authority to set the rate of interest and collection costs on delinquent sewer charges and by stating that PAMS had the power to terminate water service and conduct judicial hearings to resolve disputes regarding the delinquent charges. PAMS objected, asserting that the Boroughs have the right to contract with PAMS to collect their delinquent sewage charges and, as such, PAMS has the authority to terminate water service for non-payment until such time as all overdue charges, including interest and costs, are paid.

The trial court sustained PAMS's objection and dismissed count IV of the complaint holding that PAMS, as an agent of the Boroughs, was authorized to set interest rates and collection costs, terminate water service and hold judicial hearings. However, as we mentioned in our discussion of count III, PAMS did not have the authority to assess interest

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Because PAMS cannot assess interest rates and collection costs, PAMS has not acted within the scope of its official duties. As such, PAMS is not entitled to governmental immunity.

rates or collection costs. Therefore, the trial court erred in granting the preliminary objections to count IV.

COUNT V

Finally, in count V of their complaint, Green and Bair allege that the Boroughs deprived them of property in violation of their civil rights and, as such, the Boroughs are liable under 42 U.S.C. §1983. The Boroughs objected, claiming that the Borough did not deprive Green and Bair of any property right and, moreover, Green and Bair have an adequate state remedy thus precluding their claim under section 1983. The trial court agreed.

Section 1983 states, in pertinent part:

> Every person who, under color of statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress...

Thus, Green and Bair must establish: (1) that the conduct complained of was committed by a person acting under color of state law and (2) that such conduct deprived the plaintiff of rights, privileges or immunities secured by the Constitution

or laws of the United States. Cohen v. Philadelphia, 736 F.2d 81 (3d Cir. 1984), cert. denied, 469 U.S. 1019 (1984).

We agree with the trial court that Green and Bair's complaint failed to identify any specific property of which they have been deprived. In their brief, Green and Bair argue that their protected property right is their interest in their own money; however, Green and Bair never claimed the Boroughs deprived them of any money. Nor do Green and Bair allege that their water service had been terminated without a hearing, that PAMS garnished their bank accounts or otherwise seized any of their property in order to collect the delinquent charges and penalties, or that PAMS had taken any property of Green and Bair with or without a hearing. The conduct complained of by Green and Bair is PAMS's sending notices setting forth claims for sewer charges and penalties which Green and Bair believe are improper. However, freedom from receipt of such claims is not a protected property interest.

Moreover, the General Assembly has provided for a judicial hearing before water service can be terminated. See Section 1 of the Municipality Authorities Act, 53 P.S. §2261. Under section 1, if a person liable for the payment of delinquent sewage charges delivers a written statement to the municipality supplying the service, taken under oath and stating that he has a just defense to the claim, the service cannot be terminated until the claim has been judicially determined. As such, full and adequate state remedies exist which nullify the availability of a cause of action under §1983. For these reasons, the trial court properly sustained the Borough's preliminary objections to count V of the complaint.

Accordingly, we affirm the trial court's decision as to counts I, II and V; however, we reverse the trial court's determination as to counts III and IV.

ROCHELLE S. FRIEDMAN, JUDGE

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

No. 350 C.D.1994

JUDITH GREEN and PAUL BAIR,
and all others similarly
situated,

Appellants

v.

PENNSYLVANIA MUNICIPAL SERVICES COMPANY, CENTRAL TAX BUREAU OF PENNSYLVANIA, INC., JORDAN TAX SERVICE, INC., BOROUGH OF WILKINSBURG, BOROUGH OF RANKIN, and all other Municipalities similarly situated

ORDER

AND NOW, this 1st day of June, 1995, the order of the Court of Common Pleas of Allegheny County, entered January 7, 1994, at G.D. 93-6058, is hereby AFFIRMED as to counts I, II and V and is hereby REVERSED as to counts III and IV.

/s/ Rochelle S. Friedman
ROCHELLE S. FRIEDMAN, JUDGE

APPENDIX C

IN THE COURT OF COMMON PLEAS OF
ALLEGHENY COUNTY, PENNSYLVANIA
CIVIL DIVISION

No. GD93-6058

JUDITH GREEN AND PAUL BAIR,
and all others similarly situated,

Plaintiffs,

v.

PENNSYLVANIA MUNICIPAL SERVICE
COMPANY, BOROUGH OF
WILKINSBURG, and BOROUGH OF RANKIN,
and all other municipalities similarly situated,

Defendants.

OPINION

HORGOS, J.

Plaintiffs, Judith Green and Paul Bair, filed a Class Action Complaint on behalf of themselves and all others similarly situated against Defendants Pennsylvania Municipal Services Company, Central Tax Bureau of Pennsylvania, Inc., Jordan Tax Service, Inc. Borough of Wilkinsburg, Borough of Rankin, and all other municipalities similarly situated. All of the named defendants filed Preliminary Objections to the

Complaint. By Orders dated June 16, 1993, the court sustained the Preliminary Objections of defendants Central Tax Bureau of Pennsylvania, Inc. and Jordan Tax Service, Inc. and the Complaint was dismissed as to those two Defendants.

Plaintiffs filed an Amended Class Action Complaint naming as defendants Pennsylvania Municipal Service Company, Borough of Wilkinsburg and Borough of Rankin, and all other municipalities similarly situated. The named defendants filed Preliminary Objections to the Amended Complaint and the court sustained the Preliminary Objections by Order of Court of July 7, 1994. From this Order, plaintiffs have filed an Appeal to the Pennsylvania Commonwealth Court.

Plaintiffs Bair and Green are property owners in the Borough of Wilkinsburg and Borough of Rankin respectively. Defendant, Pennsylvania Municipal Service Company (PAMS), provides services to various municipalities and school districts in the collection of real estate taxes, earned income taxes, sanitation fees and other charges and claims owed by residents, tax payers and property owners. PAMS collects unpaid sewage charges on behalf of the Boroughs of Rankin and Wilkinsburg.

Treatment of sewage in most municipalities in Allegheny County is performed by the Allegheny County Sanitary Authority (ALCOSAN). Each property owner who receives this service is billed directly by ALCOSAN for the sewage treatment services provided. If the property owner in a municipality fails to pay the sewage charges owed to

ALCOSAN in a timely manner, the municipality pays the sewage charges out of its general fund. The municipality is then empowered to collect the unpaid delinquent sewage charges from the delinquent property owner. Collection of all delinquent sewage charges is thus the responsibility of the individual municipality such as Wilkinsburg and Rankin.

Both Wilkinsburg and Rankin contracted with defendant PAMS to collect delinquent sewage charges owed to the municipalities.

In Count I of their Amended Complaint, plaintiffs challenge the legality of the procedure used by PAMS to collect delinquent sewage charges. The essence of the cause of action stated by plaintiffs is that claims for unpaid sewage charges are "municipal claims" within the meaning of 53 P.S. 7101 pertaining to municipal claims and liens. Plaintiffs allege that the law limits interest rates on claims that are filed to a rate not to exceed ten percent (10%) per annum from the date of the filing of the lien and accordingly, that any charges or costs imposed on delinquent property owners by PAMS other than a ten percent (10%) interest charge after the claim has been filed as a lien is illegal.

Defendants' first Preliminary Objection is a Motion to Dismiss Count I in the Nature of a Demurrer for legal insufficiency. Defendants argue that plaintiffs have misinterpreted the meaning of the Municipal Claims Act, 53 P.S. 7101 et seq., and have failed to recognize that no liens for unpaid sewage have been filed against either plaintiff by any of the defendants.

The Municipal Claims Act governs the filing of municipal claims and provides the procedure which enables a municipality to obtain a lien against the real estate that has given rise to the unpaid charges such as unpaid sewage charges. The liens must be filed in the Court of Common Pleas and may be enforced through a forced sale of the real estate by the County Sheriff pursuant to 53 P.S. 7271 et seq.

Plaintiffs rely on section 7143 of the Municipal Claims Act which provides:

> Interest as determined by the municipality at a rate not to exceed ten percent (10%) per annum shall be collectible on all municipal claims from the date of the completion of the work after it is filed as a lien, and on claims for taxes water rents or rates, lighting rates or sewage rates from the date of the filing of the lien therefore.
> 53 P.S. 7143.

This language clearly authorizes interest on municipal claims after they have been filed and sets the time at which the interest begins to accrue. This section, however, does not pertain to the penalties imposed by PAMS at issue here where no lien has been filed.

The Municipal Claims Act does not limit a municipality's other powers or remedies in collecting legitimate charges related to municipal services, including sewage treatment. In fact, the Borough Code, 53 P.S. 46202

specifically authorizes boroughs to set charges and fees in the operation of utilities or other services provided to residents.

Section 46202 of the Borough Code provides:

> 46202 Specific Powers
> The powers of the borough shall be vested in the corporate authorities. Among the specific powers of the borough shall be the following, and in the exercise of any of such powers involving the enactment of any ordinance or the making of any regulation, restriction or prohibition, the borough may provide for the enforcement thereof and may prescribe penalties for the violation thereof or for the failure to conform thereto:
>
> . . . .
>
> (2) Regulation of charges in the operation of its utilities, parking meters, parking lots, recreational facilities or its other facilities and services to the public. In the operation of its utilities, parking meters, parking lots, recreational facilities, and other facilities and services, to make and regulate charges therefor for general borough purposes.
>
> 53 P.S. 46202(2)

In Skupien v. Borough of Gallitzin, 134 Pa. Commonwealth Ct. 115, 578 A.2d 577 (1990), the Plaintiff challenged the municipality's authority to enact an ordinance

that imposed personal liability on the owner of property for the failure of a tenant to satisfy his contractual obligation to the municipality to pay for water service. Commonwealth Court upheld the ordinance and stated that both the Municipal Claims Act and the Borough Code vested municipalities with broad powers to regulate the collection of unpaid water bills.

In Plaintiffs' Brief in Response to Defendants Preliminary Objections, Plaintiffs concede that 53 P.S. 46202(2) confers upon a municipality the authority to set fees for sewage treatment, but argue that a private corporation, such as PAMS, lacks the authority to determine the amount of penalties to be charged on delinquent sewage bills.

While a municipality cannot delegate its legislative powers, it may delegate administrative functions to its employees, officers and agents. Evans v. West Norriton Township Municipal Authority, 370 Pa. 150, 87 A.2d 474, 479 (1952). Plaintiffs appear to argue that the municipality itself must take all steps to collect delinquent sewage or water charges through official action of the Borough Council. As a practical matter, this would clearly be impossible.

Section 46005 of the Borough Code, 53 P.S. 46005, gives the members of Borough Council the authority:

> (1) To create, by motion, ordinance or resolution, and appoint a treasurer, a secretary, a solicitor, an engineer, a street commissioner, and such other officers as it deems necessary.

PAMS acted as the properly authorized agent of Rankin and Wilkinsburg to collect delinquent sewage charges from residents. Accordingly, Defendants' Preliminary Objection in the Nature of a Demurrer to Count I was sustained.

Defendants' second Preliminary Objection is a Motion in the Nature of a Demurrer to Dismiss Count II for failure to allege a cause of action under the Federal Fair Debt Collection Practices Act (FDCPA). Defendants' third Preliminary Objection seeks dismissal of Count III for failure to allege a sufficient cause of action for improper delegation of municipal duties. Because both Preliminary Objections are based on the relationship between PAMS and the municipalities, they will be addressed together.

Count II of Plaintiffs' Amended Complaint alleges that PAMS violated the FDCPA, 15 U.S.C. 1692(f)(1), by using unfair and unconscionable means to collect delinquent sewage charges.

Section 1692a(6) defines "debt collector" within the meaning of the Act and excludes "any officer or employee of . . . any state to the extent that collecting or attempting to collect any debt is in the performance of his official duties." 15 U.S.C. 1692a(6)(c).

PAMS is the appointed agent of Wilkinsburg and Rankin to collect delinquent sewage charges. That the boroughs have the authority to make such an appointment has already been discussed. Plaintiffs do not cite any statute or case to support the contention that a borough cannot employ

or appoint an outside contractor to perform routine administrative functions such as collecting taxes or delinquent municipal charges. PAMS is acting as the agent of the municipalities and, as such, is not a "debt collector" within the meaning of the Act.

Count III of Plaintiffs' Amended Complaint alleges that only a municipality has the authority to request or direct termination of water service in order to collect delinquent sewage charges. Plaintiffs cite no authority for this contention. Plaintiffs also fail to make any factual allegations in Count III that would constitute improper delegation of municipal duties by Rankin or Wilkinsburg.

Plaintiffs also do not dispute that they were delinquent in paying sewage charges and that the charges were valid and accurate. They do not allege that their water service was terminated. In short, plaintiffs state that it is illegal for PAMS to give notice to borough residents of the lawful action that will be taken if they fail to pay valid overdue charges owed to the municipality. No cause of action has been stated in Count III.

Count IV of Plaintiffs' Amended Complaint alleges a claim against PAMS for fraudulent misrepresentation. In order to set forth a cause of action for fraudulent misrepresentation, the following elements must be present:

(1) a misrepresentation;

(2) a fraudulent utterance;

(3) an intention by the maker to induce the recipient thereby;

(4) justifiable reliance by the recipient on the misrepresentation; and

(5) damage to the recipient as a proximate result of the misrepresentation.

Sevin v. Kelshaw 417 Pa. Super. 1, 611 A.2d 1232 (1992).

Plaintiffs allege in Count IV that PAMS misrepresented that:

(1) it had the authority to set and collect penalties;

(2) it had the authority to order the termination of water services; and

(3) it had the authority to conduct judicial hearings in order to resolve disputes regarding money owed for sewer rates.

There is no misrepresentation by PAMS. A borough has the right to appoint officers as it deems necessary. 53 P.S. 46005. The plaintiffs state in paragraph 7 of the Amended Class Action Complaint that PAMS was hired by the Boroughs of Wilkinsburg and Rankin to collect delinquent sewage charges.

The Boroughs of Wilkinsburg and Rankin and PAMS, as the Boroughs' appointed agent, also have the authority to assess and set penalties on delinquent sewage charges and to

terminate water service until such time as the overdue sewage charges, including penalties and interest, are paid. 53 P.S. 2261. A hearing to resolve conflicts regarding sewage charges and penalties provides the customers with notice and an opportunity to be heard. Nothing in the statute prohibits PAMS, as the Borough's agent, from conducting hearings prior to terminating water service. Plaintiffs have failed to state a cause of action for fraudulent misrepresentation in Count IV of the Amended Complaint.

Count V of Plaintiffs' Amended Complaint alleges that the Boroughs of Wilkinsburg and Rankin and all other municipalities similarly situated have deprived the plaintiff class of their civil rights and are liable under the Civil Rights Act of 1871, 42 U.S.C. 1983.

In order to state a cause of action for a civil rights violation, the plaintiffs are required to allege (1) that they have been deprived of a federal right, either statutory or constitutional, and (2) that the person depriving them of the federal right was acting under color of state law. Gomez v. Toledo, 446 U.S. 635 (1980). Plaintiffs assert that they have been deprived of property without due process of law. Plaintiffs, however, have not set forth a property right which is secured by the constitution or laws of the United States. In Board of Regents of State Colleges v. Roth, 408 U.S. 564 (1972), the United States Supreme Court stated:

> A person clearly must have more than an abstract need or desire for it. He must have more than a unilateral expectation of it. He

> must, instead, have a legitimate claim of entitlement to it...
>
> Property interests, of course, are not created by the constitution. Rather, they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law - rules or understandings that secure certain benefits and that support claims of entitlement to those benefits.
> 408 U.S. at 577.

Plaintiffs have not alleged a specific Pennsylvania law that guarantees them the right to not be assessed a penalty and service charge on delinquent sewer bills. The property right alleged by the plaintiffs does not rise to the level of a federally protected property right.

Moreover, section 1983 actions are limited to those cases where the plaintiff does not have an adequate state remedy. Cohen v. City of Philadelphia, 736 F.2d 81 (3d Cir. 1984). "In the context of deprivations of property interests it is clear that where there are adequate post-deprivations state tort claims procedures available to a plaintiff there is not denial of due process." Dobson v. Green, 596 F.Supp. 122 (E.D. Pa. 1984).

If plaintiffs have in fact suffered a harm for which the law provides remedies, the plaintiffs have an adequate remedy at state law.

The defendants also raise the defense of governmental immunity on behalf of PAMS. PAMS was acting as the agent of the Borough of Wilkinsburg and Rankin in collecting the sewage charges. As the agent of the municipalities, PAMS can only be liable to the extent the municipalities are liable.

42 Pa. C.S.A. 8541 provides:

> Except as otherwise provided in this subchapter, no local agency shall be liable for any damages on account of any injury to a person or property caused by any act of the local agency or an employee thereof or any other person.

The immunity provided by section 8541 applies to any suit involving injury unless the act or omission gives rise to liability that falls under one of the eight exceptions to governmental immunity enumerated in 42 Pa. C.S.A 8542. Gilius v. Board of Supervisors of Fairview Township, 122 Pa. Commonwealth Ct. 371, 552 A.2d 327 (1988). None of the exceptions so listed include a claim for an economic loss as a result of the collection of allegedly unlawful penalties on delinquent sewage charges or claims for improper delegation or misrepresentation related to such collections. Counts I, III, and IV, therefore, may also be dismissed under the doctrine of governmental immunity.

Defendants final Preliminary Objection raises the argument that plaintiffs have failed to allege that prerequisites of a class action with respect to the defendant class. As earlier noted, the Amended Complaint names as defendants

the Borough of Wilkinsburg, Borough of Rankin and all other municipalities similarly situated. Because the court sustained Defendants' first six Preliminary Objections and dismissed Plaintiffs' Amended Complaint, it is not necessary to address the deficiencies in Plaintiffs' Amended Complaint in regard to the defendant class.

For all of the foregoing reasons, the court sustained Defendants' Preliminary Objections and dismissed Plaintiffs' Amended Complaint with prejudice.

BY THE COURT:

/s/ Robert P. Horgos, J.

July 18, 1994

IN THE COURT OF COMMON PLEAS OF
ALLEGHENY COUNTY, PENNSYLVANIA
CIVIL DIVISION

No. GD93-6058

JUDITH GREEN AND PAUL BAIR,
and all others similarly situated,

Plaintiffs,

v.

PENNSYLVANIA MUNICIPAL SERVICE
COMPANY, BOROUGH OF
WILKINSBURG, BOROUGH OF RANKIN,
and all other municipalities similarly situated,

Defendants.

ORDER OF COURT

AND NOW, TO-WIT, this 7th day of 94, it is hereby ORDERED, ADJUDGED, AND DECREED that Defendants, Pennsylvania Municipal Service Company, Borough of Wilkinsburg and Borough of Rankin's Preliminary Objections are sustained and the Class Action Complaint filed by Judith Green and Paul Bair, and all others similarly situated is hereby dismissed.

/s/ Robert P. Horgos, J.

APPENDIX D

IN THE COURT OF COMMON PLEAS OF ALLEGHENY COUNTY, PENNSYLVANIA

JUDITH GREEN and PAUL BAIR, and all others similarly situated, Plaintiffs,	CIVIL DIVISION NO. G.D. 93-6058 TYPE OF PLEADING:
v.	Amended Class Action Complaint
PENNSYLVANIA MUNICIPAL SERVICES COMPANY, BOROUGH OF WILKINSBURG, BOROUGH OF WILKINSBURG, BOROUGH OF RANKIN and all other municipalities similarly situated, Defendants.	FILED ON BEHALF OF: Plaintiffs
	COUNSEL OF RECORD FOR THESE PARTIES:

Jan C. Swensen, Esq.
Pa. I.D. #00263
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Pittsburgh, PA 15222
(412) 281-1970

JURY TRIAL DEMANDED

NOTICE TO DEFEND

YOU HAVE BEEN SUED IN COURT. IF YOU WISH TO DEFEND against the claims set forth in the following pages, YOU MUST TAKE ACTION WITHIN TWENTY (20) DAYS after the Complaint and Notice are served, by entering a written appearance personally or by attorney and filing in writing with the Court your defenses or objections to the claims set forth against you. You are warned that IF YOU FAIL TO DO SO, the case may proceed without you and a JUDGMENT MAY BE ENTERED AGAINST YOU BY THE COURT without further notice for any money claimed in the Complaint OR FOR PROPERTY OR OTHER RIGHTS IMPORTANT TO YOU.

YOU SHOULD TAKE THIS PAPER TO YOUR LAWYER AT ONCE. IF YOU DO NOT HAVE OR KNOW A LAWYER, THEN YOU SHOULD GO TO OR TELEPHONE THE OFFICE SET FORTH BELOW TO FIND OUT WHERE YOU CAN GET LEGAL HELP.

LAWYER REFERRAL SERVICE OF
THE ALLEGHENY COUNTY BAR ASSOCIATION

400 Koppers Building
736 Seventh Avenue
Pittsburgh, Pennsylvania 15219
(412) 261-0518

IN THE COURT OF COMMON PLEAS OF ALLEGHENY COUNTY, PENNSYLVANIA
CIVIL DIVISION

JUDITH GREEN and PAUL BAIR, and all others similarly situated,

Plaintiffs, No. G.D. 93-6058

v.

PENNSYLVANIA MUNICIPAL SERVICES COMPANY, BOROUGH OF WILKINSBURG, BOROUGH OF WILKINSBURG, BOROUGH OF RANKIN and all other municipalities similarly situated,

Defendants.

AMENDED CLASS ACTION COMPLAINT

AND NOW come the plaintiffs, JUDITH GREEN and PAUL BAIR, by their attorneys, JAN C. SWENSEN, NELSON B. GAUGLER and SWENSEN PERER & JOHNSON, and file the following Amended Class Action Complaint on behalf of themselves and all others similarly situated:

1. Plaintiff Judith Green is an individual who resides at 1108 Maple Avenue, Pittsburgh, Allegheny County, Pennsylvania 15221. Plaintiff Green is the owner of the real property located at said address, which is in the Borough of Wilkinsburg.

2. Plaintiff Paul Bair is an individual who resides at 2803 Reiter Road, Pittsburgh, Allegheny County, Pennsylvania 15235. Plaintiff Bair owns real property located at 15 Holland Avenue in the Borough of Rankin.

3. Defendant Pennsylvania Municipal Services Company (hereinafter "PaMS") is a private for profit Pennsylvania corporation, with a place of business at 336 Delaware Avenue, Oakmont, Pennsylvania 15139.

4. Defendant Borough of Wilkinsburg is a political subdivision located in Allegheny County, Pennsylvania. Wilkinsburg's Borough building is located at 605 Ross Avenue, Pittsburgh, Pennsylvania 15221.

5. Defendant Borough of Rankin is a political subdivision located in Allegheny County, Pennsylvania. Rankin's Borough building is located at 320 Hawkins Avenue, Rankin, Pennsylvania 15104.

6. The defendants have acted, in all relevant matters hereinafter referred to, through their agents, employees and servants acting in the course and scope of their employment and agency.

7. The Boroughs of Wilkinsburg and Rankin have hired PaMS to collect delinquent sewer rates from persons who own property within defendant boroughs. PaMS is neither a municipality nor an officer of any municipality.

8. Plaintiffs Green and Bair bring this class action on behalf of themselves and all other Pennsylvania residents who have been forced to pay certain illegal service charges and/or penalties imposed by PaMS for delinquent sewer rates.

CLASS ACTION ALLEGATIONS

9. The number of plaintiff class members is believed to be in the thousands; thus, joinder of all interested parties as named plaintiffs is impracticable.

10. The amount which would be due each individual class member if a favorable result is achieved ranges from $5.00 to approximately $150.00. These amounts are insufficient to support separate individual actions.

11. The municipalities which presently or have in the past employed PaMS to collect delinquent sewer rates on their behalf are known by PaMS but are unknown to the plaintiffs, and certainly number in the hundreds and may number in the thousands; thus, joinder as named defendants of all municipalities similarly situated to Wilkinsburg and Rankin is impracticable.

12. Plaintiffs Bair and Green believe that their claims are typical of all other class members, in that the manner by which the illegal charges have been collected from

the plaintiffs is the same means used to collect illegal charges from the class members.

13. Plaintiffs believe and therefore aver that, while the amounts illegally collected from various members of the class may differ, the fact that illegal penalties were collected from each class member is an operative fact common to each class member.

14. The questions of law applicable to each class member's claim against PaMS and/or the municipality in which the class members own property are identical among all class members. The predominant questions of law are:

a. Whether PaMS is legally authorized to charge any fees and penalties to the plaintiff class members when collecting delinquent sewer charges.

b. Whether PaMS and the defendant class of municipalities have violated the plaintiff class members' procedural rights by the methods they have used to collect penalties on delinquent sewer rates.

c. Whether the defendant class of municipalities have deprived plaintiff class members of their constitutional and legal rights.

15. Plaintiffs Green and Bair will fairly and adequately assert and protect the interests of the class. Specifically:

a. Plaintiffs Bair and Green believe and therefore aver that the law firm of Swensen Perer & Johnson possesses the requisite skill and experience necessary to prosecute this class action;

b. Plaintiffs Bair and Green have no conflict of interest in the maintenance of this class action;

c. Plaintiffs Bair and Green believe and therefore aver that they possess or can acquire adequate financial resources to assure that the interests of the class are adequately protected;

d. Plaintiffs Bair and Green believe and therefore aver that no litigation involving these parties or these issues is underway or has been brought before;

e. Plaintiffs Bair and Green believe and therefore aver that this Court is the appropriate forum for the adjudication of this class action.

16. For the reasons set forth above, a class action will provide the fairest and most efficient method for adjudication of the claims set forth herein by the class representatives.

WHEREFORE, plaintiffs Bair and Green request that this action be certified as a class action.

COUNT I

GREEN and BAIR and all others similarly situated v. PENNSYLVANIA MUNICIPAL SERVICES COMPANY

17. Paragraphs 1 through 16 are hereby incorporated by reference as if fully set forth herein.

18. PaMS is in the business of, *inter alia*, collecting delinquent sewer rates on behalf of the defendant class of municipalities.

19. The sewer rates collected by PaMS are "municipal claims" pursuant to the General Municipal Law, 53 P.S. §7101.

20. The maximum interest rate which may be charged on sewer rates is 10 percent per annum pursuant to the General Municipal Law, 53 P.S. §7143.

21. Said law also provides at Section 7143 that the rate of interest is to be determined by the municipality.

22. Said law also provides at Section 7143 that no interest may be charged prior to the date a lien is filed.

23. PaMS is not a municipality nor an officer of a municipality. PaMS is an independent contractor hired by the members of the defendant class of municipalities to collect delinquent sewer rates.

24. The sewer rates billed by PaMS to the plaintiff class members as described in Paragraphs 26, 27, 28 and 30 are not assessments within the meaning of the General Municipal Law, 53 P.S. §7203.

25. The sewer rates billed by PaMS to the plaintiff class members as described in Paragraphs 26, 27, 28 and 30 are not taxes within the meaning of the Local Tax Collection Law, 72 P.S. §5511.2.

26. On or about May 13, 1992, PaMS sent a notice to Judith Green, which notice stated that Green owed $55.00 in penalties on $64.32 in delinquent sewer rates for the 1108 Maple Avenue property. Said penalties are not interest and exceed the maximum interest allowed by law. A copy of the May 13, 1992 notice is attached hereto as Exhibit "A" and incorporated herein by reference.

27. On or about March 6, 1992, PaMS sent a notice to Paul Bair (incorrectly identified on the notice as "Blair"), which notice stated that Bair owed $85.00 in penalties on $104.42 in delinquent sewer rates for the 15 Holland Avenue property. Said penalties are not interest and exceed the maximum interest allowed by law. A copy of the two-page March 6, 1992 notice is attached hereto as Exhibit "B" and incorporated herein by reference.

28. Plaintiffs believe and therefore aver that the penalties described in Paragraphs 26 and 27 are typical and representative of the penalties collected by PaMS from members of the plaintiff class.

29. Plaintiffs believe and therefore aver that PaMS sends notices substantially similarly to Exhibits "A" and "B" to members of the plaintiff class on a random basis, adding at least a $5.00 penalty each time a notice is sent.

30. PaMS periodically and on a random basis charges $15.00 or $20.00 when it sends the said notices.

31. The penalties billed by PaMS as described in Paragraphs 26, 27, 28 and 30 are not authorized by law and exceed the interest that is authorized by law.

32. PaMS employs numerous techniques in order to collect the illegal penalties described in Paragraphs 26, 27, 28 and 20. The collection techniques include but are not limited to the following:

a. PaMS threatens to terminate water service;

b. PaMS repeatedly sends notices similar to Exhibits "A" and "B" and adds a penalty each time a notice is sent;

c. PaMS sends repeated notices, in a random fashion, such that the penalty frequently equals or exceeds the outstanding sewer rates;

d. PaMS indicates to real estate closing officers that the illegal penalties are lienable items against real estate being transferred, compelling the closing officer to collect and

pay said penalties as proceeds of the closing in order to protect the title of the property.

33. By reason of the aforesaid actions, PaMS is liable to Judith Green and Paul Bair and all others similarly situated for all the money collected by PaMS in excess of the amounts authorized by law.

WHEREFORE, plaintiffs Judith Green and Paul Bair and all others similarly situated demand judgment against Pennsylvania Municipal Services Company in an amount in excess of $25,000.00 plus costs and interest.

COUNT II

GREEN and BAIR and all others similarly situated v. PENNSYLVANIA MUNICIPAL SERVICES COMPANY

34. Paragraphs 1 through 33 are hereby incorporated by reference as if fully set forth herein.

35. PaMS has violated the Federal Fair Debt Collection Practices Act, 15 U.S.C. §1692(f) (1) in that it has:

a. Used unfair and unconscionable means to collect said claims;

b. Engaged in the collection of money not permitted by law;

c. Misrepresented that it has the authority to hold judicial hearings to resolve disputes regarding money owed for sewer rates and/or penalties.

36. This Court has jurisdiction of this cause of action pursuant to the Fair Debt Collection Practices Act at 15 U.S.C. Section 1692k(d).

WHEREFORE, plaintiffs Judith Green and Paul Bair and all others similarly situated demand judgment against Pennsylvania Municipal Services Company in an amount in excess of $25,000.00, and in accordance with the remedies available under 15 U.S.C. Section 1692k(a).

COUNT III

GREEN and BAIR and all others similarly situated
v. PENNSYLVANIA MUNICIPAL SERVICES
COMPANY

37. Paragraphs 1 through 36 are hereby incorporated by reference as if fully set forth herein.

38. Pursuant to the General Municipal Law, 53 P.S. §7143, only municipalities may determine the rate of interest on delinquent sewer rates, which determination is a municipal function.

39. Pursuant to Pennsylvania Constitution, Article 3, Section 31, a municipal function may not be delegated to a private corporation.

40. PaMS is without legal authority to determine what penalties, if any, will be collected from property owners who owe delinquent sewer rates.

41. Pursuant to the General municipal Law, 53 P.S. §2261, only municipalities or municipal authorities have the authority to request or direct the termination of water service in order to collect delinquent sewer rates.

42. PaMS frequently and routinely threatens class members with termination of water service if the delinquent sewer rates, and the illegal penalties, are not paid.

43. PaMS is without legal authority to threaten or carry out the termination of water service.

44. PaMS has no legal right to threaten termination of water service if the illegal penalties are not paid, nor to cause liens to be placed against class members' property for nonpayment of the illegal penalties. These actions constitute outrageous conduct.

45. The aforesaid actions constitute outrageous conduct. As a result of the aforesaid unlawful, negligent and improper acts by defendant PaMS, the plaintiff class has suffered damages as described in Paragraphs 26, 27, 28 and 30.

WHEREFORE, plaintiffs Judith Green and Paul Bair and all others similarly situated demand judgment against Pennsylvania Municipal Services Company in an amount in

excess of $25,000.00, plus costs, interest and punitive damages.

COUNT IV

GREEN and BAIR and all others similarly situated v. PENNSYLVANIA MUNICIPAL SERVICES COMPANY

46. Paragraphs 1 through 45 are hereby incorporated by reference as if fully set forth herein.

47. PaMS has intentionally and fraudulently misrepresented to members of the plaintiff class, including plaintiffs Bair and Green, that it has the power to determine the amount of penalties to be paid on delinquent sewer rates.

48. PaMS has intentionally and fraudulently misrepresented to members of the plaintiff class, including plaintiffs Bair and Green, that it has the authority to terminate water service for non-payment of the illegal penalties.

49. PaMS has intentionally and fraudulently misrepresented to members of the plaintiff class, including Bair and Green, that it has the authority to conduct judicial hearings in order to resolve disputes regarding money owed for sewer rates and/or penalties.

50. PaMS has made these fraudulent misrepresentations with the intention of inducing members of the plaintiff class, including Bair and Green, to rely upon the

misrepresentations and to pay the illegal penalties described in Paragraphs 26, 27, 28 and 30.

51. Bair and Green and other class members have reasonably relied on these misrepresentations to their detriment, and have paid such illegal penalties in reliance upon such misrepresentations.

52. PaMS conduct in making the aforesaid intentional and fraudulent misrepresentations constitutes outrageous conduct.

WHEREFORE, plaintiffs Judith Green and Paul Bair and all others similarly situated demand judgment against PaMS in an amount in excess of $25,000.00 plus costs, interest and punitive damages.

COUNT V

GREEN and BAIR and all others similarly situated v. BOROUGH OF WILKINSBURG, BOROUGH OF RANKIN, and all other municipalities similarly situated

53. paragraphs 1 through 52 are hereby incorporated by reference as if fully set forth herein.

54. At all times relevant hereto, each member of the defendant class of municipalities and its agents, servants and employees was acting or claiming to act under the color of law pursuant to the authority granted to it under the provisions of the Constitution and statutes of the

Commonwealth of Pennsylvania and the ordinances, regulations, orders and procedures of each defendant municipality.

55. The damages complained of by the plaintiffs resulted from the adoption, promulgation and continuation of policies, customs, patterns and procedures of the class of municipal defendants. The actions of the class of municipal defendants consisted of the following:

a. In adopting and enforcing inherently deficient policies, directives, procedures, ordinances, resolutions and customs which resulted in the systematic deprivation of the plaintiff class's property, in violation of its members' constitutional and legal rights;

b. In failing to promulgate or enforce adequate regulations and procedures to insure that the defendant class of municipalities would properly and lawfully collect the delinquent sewer rates referred to above;

c. In maintaining policies that authorized, permitted and resulted in PaMS depriving the plaintiff class of its constitutional and legal rights;

d. In charging penalties to its property owners which were not permitted by law;

e. In causing its property owners to be deprived of property without due process of law.

56. A special relationship exists between the plaintiff class and the defendant class of municipalities under which the municipal defendants are obligated to collect delinquent sewer rates in a proper and legal manner and not in such a way that deprives the plaintiff class members of their constitutional and legal rights.

57. The class of municipal defendants has failed to fulfill its duties to the plaintiff class.

58. The aforesaid conduct of the defendant class of municipalities constitutes reckless and deliberate indifference to the constitutional and legal rights of the plaintiff class members.

59. By reason of the aforesaid conduct of the class of municipal defendants, the civil rights of the plaintiff class members, pursuant to the Constitution of United States and the Civil Rights Act of 1871, 42 U.S.C. Section 1983, have been violated in the following particulars:

a. The aforesaid policies, customs, patterns and procedures have resulted in the deprivation of the property of the plaintiff class without due process of law as guaranteed under the Fifth and Fourteenth Amendments;

b. The aforesaid policies, customs, patterns and procedures have deprived the plaintiff class of

its rights as protected by the statutes of the United States and of the Commonwealth of Pennsylvania; and

c. The plaintiff class has been denied a forum of review, either judicial or administrative, and any semblance of procedural due process.

60. The aforesaid practices and procedures of the class of municipal defendants created a substantial risk of deprivation of constitutional and other legal rights of the plaintiff class members, and have directly and proximately resulted in the damages as aforesaid.

61. Said conduct has been outrageous in nature.

WHEREFORE, plaintiffs Judith Green and Paul Bair and all others similarly situated demand judgment against the defendant class of municipalities in an amount in excess of $25,000.00, plus costs, interest and attorney's fees.

SWENSEN PERER & JOHNSON,

By /s/ JAN C. SWENSEN

SWENSEN PERER & JOHNSON,

By /s/ NELSON B. GAUGLER

VERIFICATION

I, NELSON B. GAUGLER, SWENSEN PERER & JOHNSON, verify that I am the attorney of record for JUDITH GREEN and PAUL BAIR and that I am authorized to execute this verification on their behalf. I verify that the statements made in the foregoing AMENDED CLASS ACTION COMPLAINT are true and correct to the best of my knowledge, information and belief. I understand that false statements herein are made subject to the penalties of 18 Pa.C.S. Section 4904 relating to unsworn falsification to authorities.

SWENSEN PERER & JOHNSON,

8/6/93
DATE

By /s/ NELSON B. GAUGLER